

Whale Safe USA

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Served Via Email

7 October 2018

To: michael.pentony@noaa.gov, Colleen Coogan
Greater Atlantic Regional Fisheries Office, National Marine Fisheries Service
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Director, Northeast Fisheries Science Center
National Marine Fisheries Service, 166 Water Street, Woods Hole, MA 02543-1026
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Assistant Administrator, National Marine Fisheries Service, chris.w.oliver@noaa.gov
1335 East-West Highway, Silver Spring MD 20910

RE: Petition for Proposed Regulations to Eliminate by 2020 Serious Injury and Mortality from the Entanglement of Endangered Whales and Humpback Whales by Vertical Buoy Ropes and Gill Nets Pursuant to a Modified Atlantic Large Whale Take Reduction Plan and for Its Immediate Consideration by the Atlantic Large Whale Take Reduction Team During Its Meeting in October 2018.

Attention Above Named Parties:

I, Whale Safe USA, and each of its affiliates is petitioning you pursuant to our protected right to do so under the First Amendment's Petition Clause. Our filing of this instant petition has been delayed by the unlawful conduct of you and other NOAA employees from you imposing in 2018 an unlawful GAG ORDER on all NOAA employees requiring that they have no direct communication with us without your explicit approval. Since you issued the Gag Order, you have yourselves refused all our requests to meet with you or to have a phone conversation with us. As late as last week, we were told by NOAA employees that all communications to NOAA must be served on a low level DOJ employee named Fred Turner. This individual is a retard lawyer and knows nothing of NOAA policies concerning endangered whales and also knows nothing of the conservation needs of these endangered species. Your Gag Order's sole purpose is to stop me and Whale Safe USA's affiliates from participating in the regulatory process that NOAA is now conducting to amend its Atlantic Large Whale Take Reduction Plan. I would have never heard of this process at all if I had not seen press reports of its taking place.

We are therefore insisting that our instant petition for the requested ban on whale entangling fishing gear be immediately considered at this coming week's meeting of the Atlantic Large Whale Take Reduction Team. We also are expecting that NOAA will afford us the opportunity to personally address the ALWTRT during its meeting this coming week to argue the merits for it agreeing to our petitioned action by NOAA to prohibit the use of vertical buoy ropes and gill nets off the US Atlantic coastline. If you fail to notify us in writing by close of

business day tomorrow (Monday October 8th) that the ALWTRT has accepted the instant petition and WSUSA is being offered at the said meeting the opportunity to address the ALWTRT on the instant petition's merits then we will have no other alternative but to seek appropriate relief pursuant to our current lawsuit against NOAA in the US District Court of NH.

PETITIONED FOR REGULATORY ACTION

I, Whale Safe USA and its affiliates petition NOAA to stop future killing and serious injuring of Northern Right Whales, other Endangered Whales and Humpback Whales by their being entangled in commercial marine fisheries operations AND to stop the adverse impact by commercial fishing gear on the listed designated critical habitat for the Northern Right Whale by NOAA taking the following proposed agency actions —

1. Prohibit the use of Vertical Buoy Ropes in all crab and lobster pot fishing gear in all US Atlantic coastal waters commencing in 2020, and/or
2. Prohibit the use of fixed gill nets in all US Atlantic coastal waters starting in 2020, and/or
3. Immediately revoke all current regulations requiring fishermen to use Vertical Buoy Ropes in their lobster/crab pot fishing gear.

Vertical Buoy ropes are responsible for almost all entanglements of whale and sea turtles in pot fishing gear off the Atlantic coastline. In 1997, the First Circuit Appeals Court affirmed a US District Court for Massachusetts previous ruling that Vertical Buoy Ropes are entangling large whales in Massachusetts, that government agencies are violating the Endangered Species Act Section 9 prohibitions by licensing fishing gear that entangles endangered species of whales, and issued an injunction requiring government fishing agencies to apply for and be issued an ESA incidental take permit in order to lawfully continue to license marine fisheries that have historically entangled endangered whales. **FN1**

NOAA's current regulations requiring its licensed fishermen to use vertical buoy ropes in their lobster/crab pot fishing gear is categorically prohibited by the ESA Section 9 prohibitions against the incidental taking of endangered species. As actually "prohibited" as oppose to being merely "unlawful", NOAA has no authority of any kind to require the use of vertical buoy ropes in fishing gear. The ESA requires NOAA to immediately cease and desist its requiring its licensed commercial fishermen to use vertical buoy ropes in their fishing gear. No other consideration is possible in regards to said prohibited conduct under the law.

The enactment of the petitioned for regulatory reforms will allow the establishing of a viable marketplace for innovative whale safe fishing technology. NOAA's failure over the last several decades since the *Strahan v. Coxe* ruling to cease its requiring the use of VBR in

¹ See *Strahan v. Coxe*, 939 F. Supp. 963 (Dist. Mass. 1996) and affirmed by 127 F. 3d 155 (1st Circuit, 1997) (Massachusetts marine fishing agency liable under ESA Section 9(a) for unlawful taking of ESA listed species of endangered whales by entanglements of endangered whales in fishing gear licensed and regulated this agency).

lobster/crab pot fishing gear has prevented the establishment of a marketplace for any possible whale safe fishing gear. There has been no reason for entrepreneurs to either invest their treasure or effort in implementing whale safe fishing gear, if NOAA is actually prohibiting under force of law the use of any possible whale safe fishing technology through its requirement for the continued use of VBL by its licensed fishermen.

Whale Safe USA has designed and is now field testing whale safe fishing gear. However we are prohibited by NOAA from using our whale safe fishing technology owing to NOAA's currently requiring the use of VBR in lobster/crab pot gear despite its known characteristic of entangling endangered whales and sea turtles.

Whale Safe USA is therefore petitioning NOAA to prohibit the further use of VBR in lobster/crab pot fishing gear so that a whale safe fishing gear market will immediately be established. I, WSUSA, and its affiliates are petitioning NOAA to stop its requiring the use of whale killing fishing gear that is preventing myself, Whale Safe USA, its affiliates and other commercial fishermen it licenses from engaging in whale safe fishing practices.

In Peace,

/s/ Richard Maximus Strahan

Richard Maximus Strahan
Chief Science Officer
Whale Safe USA